IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 72

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

A. L. MECHLING, et al.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF APPELLEE, INLAND WATERWAYS CORPORATION.

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January 4, 1947.

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Opinions below

The specially constituted District Court rendered no written opinion. Its findings of fact and conclusions of law are not reported, but are set forth in the printed record. (R. 177) The report and order of the Interstate Commerce Commission which were set aside and enjoined by the court below are reported in 262 I. C. C. 7. Prior reports in that proceeding, known as *Investigation*

and Suspension Docket No. 4718 Grain Proportionals, Ex-Barge to Official Territory, appear in 246 I. C. C. 353, and 248 I. C. C. 307.

Jurisdiction

The final decree of the District Court was entered on November 26, 1945. (R. 207) Petition for appeal was filed (R. 209) and allowed on January 24, 1946. (R. 214) Probable jurisdiction was noted April 29, 1946. (R. 228) The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, 32, 38 Stat. 208, 219, 220 (Title 28, U. S. C., Secs. 47 and 47a) and Section 28 of the Judicial Code as amended. (Title 28, U. S. C., Sec. 345).

Statutes

The provisions of Section 3(4) of the Interstate Commerce Act are relied upon herein and are reproduced in Appendix A, together with certain other important sections, of the statutes.

Statement

EXPLANATION OF TERMS

For clarity, we define the following terms used herein:

Ex-barge grain means grain that is transported to Chicago by the barge-line appellees over the inland waterways and is reshipped from Chicago via rail, either immediately or after a period of storage. *Ex-rail grain* or *ex-lake grain* means grain that arrives at Chicago via railroad or lake steamer, respectively, and is similarly reshipped therefrom.

Proportional or *reshipping rates* are separately established rates which, by their terms, apply only to grain that

has received a prior transportation service of the particular character specified in the tariffs naming such rates. The term *ex-barge rate*, or *ex-rail* or *ex-lake rate* means a proportional or reshipping rate that applies to grain transported to the reshipping point via specified mode of inbound transportation. Some proportional rates are restricted to grain from a defined origin territory. Such rates are qualified by terms indicating the designated territory, as for example, "Trans-Mississippi" (or "TM") and "Northwest." *Local rates* are those that apply when the traffic has had no prior haul or when the prior haul does not meet the conditions specified for the application of proportional rates.

Official territory is the territory east of Chicago and north of the Ohio and Potomac rivers. It includes *central territory*, which lies between Chicago and the Buffalo-Pittsburgh line, and *eastern trunk-line* and *New England territories*, east thereof.

We refer to the Interstate Commerce Commission as the *Commission*. Citations herein of the *Act* or specific sections of the *Act* refer to the Interstate Commerce Act, as amended. (Title 49, U. S. C.).

TRAFFIC AND RATES OF THIS APPELLEE AND ITS COMPETITORS

The traffic with which this appellee is particularly concerned is wheat and other grain that it transports from Kansas City, Mo.-Kans., to Chicago for rail reshipment beyond. That traffic pays to Chicago 9.5 cents [1] via barge and 16 cents via the lines of competing rail carriers. (Rep. 19, 39, 40; [2] R. 23, 45, 46) The Commission found

[1] Rates are stated in cents per hundred pounds.

[2] References in this form are to pages of the Commission's report in this case, as reported in 262 I. C. C. 7. In each instance reference is also shown to the corresponding page of the record where the report is printed.

that the barge rate yields a fair return to the appellee and is reasonable. (Rep. 19; R. 23) The rail rate was prescribed as reasonable in the *Grain & Grain Products case*, 205 I. C. C. 301, 215 I. C. C. 83. The difference of 6.5 cents is partially offset by the charges incurred in transferring the ex-barge grain at Chicago. Those charges amount to 3.25 cents.[3] In addition, barge shipments from rail elevators at Kansas City must bear switching charges of $6.93 or $8.91 per car, and a transfer charge of 39 cents per ton. There is only one river elevator at Kansas City. (Rep. 23; R. 27)

Wheat and other grains also come to Chicago via lake for reshipment via eastern railroads. From Duluth, Minn., for a water haul of 808 miles, the steamer charge is about 5 cents. (Rep. 18; R. 21) The 9.5-cent barge rate from Kansas City to Chicago applies to a water haul of 722 mile. (Rep. 40; R. 46)

At present, ex-rail grain and ex-barge grain originating at Kansas City pay precisely the same reshipping rate to all destinations east of Chicago. To eastern trunk-line and New England territories, the ex-lake grain from Duluth also pays that same rate. To those territories, the reshipping rate is the same on all grain having a prior haul to Chicago whether via water or rail and from *any* origin territory. (Rep. 12; R. 16)

To central territory, the reshipping rates on grain from Duluth are the same for ex-lake and ex-rail grain. (Rep. 18; R. 21) They are called Northwest proportionals and are generally higher than the Trans-Mississippi proportionals from Kansas City. (Rep. 13; R. 16) Both ex-barge grain and ex-rail grain from Kansas City take the Trans-Mississippi basis. (Rep. 20; R. 24)

[3] These charges are not for railroad services but are for trimming, weighing and inspection at time of transfer from barges to cars through a water-front elevator. (Rep. 23; R. 27)

The Commission found that the rates to trunk-line and New England territories are by far the most important in this proceeding, as marketers and processors in central territory can and do transit under such rates. (Rep. 15; R. 18) The present proportional rate on ex-rail, ex-barge, and ex-lake grain from Chicago to New York is 26 cents and the local rate is 34.5 cents. (Rep. 39; R. 43)

THE PRIOR PROCEEDING

The proceedings before the Commission were instituted in 1939 under Section 15(7)[1] (248 I. C. C. 307). The eastern lines then proposed to restrict all reshipping rates so as to be inapplicable to the reshipment of any grain which moved to Chicago via the Illinois Waterways. The eastern lines explained that proposal as designed to "drive this business off the water and back on to the rails where it belongs." (248 I. C. C. 307, 321) Hearings were held in 1939 and early 1940, prior to the amendment of Section 3(4), which now prohibits discrimination by a common carrier by railroad against a common carrier by water. In its report the Commission held that the proposed schedules were just and reasonable and not otherwise unlawful. (Rep. 8; R. 11-12) That order was set aside in *Cargill, Inc.* v. *United States* (1942), 44 Fed. Supp. 368, but on appeal the decree of the District Court was reversed. (*Interstate Commerce Commission* v. *Inland Waterways Corp.* (1943), 319 U. S. 671.)

THE PRESENT PROCEEDINGS

Thereafter, the Commission reopened the proceeding for further hearing on the question as to what would be

[1] All sections of the statutes referred to herein are to the Interstate Commerce Act as amended unless otherwise indicated.

reasonable and otherwise lawful proportional or reshipping rates for application to ex-barge grain. (Rep. 9; R. 12)

In its report and order on further hearing (the report was made a part of the order by the terms thereof, R. 49), the Commission prescribed and approved ex-barge rates from Chicago certain amounts less than the corresponding local rates. To New York, as a representative destination, the ex-barge rate was made 5.5 cents lower than the local rate of 34.5 cents, or 29 cents. The Commission expressly held that such a rate would be lawful under Sections 1, 2, 3(1), 3(4), 6(11)(b), and 15a(2) of the Act, administered with a view to carrying out the National Transportation Policy. (Rep. 32; R. 36-37) The existing ex-rail and ex-lake rates of 26 cents from Chicago to New York were not disturbed. They are 8.5 cents under the local rate. This means that the prescribed and approved ex-barge rate to New York is 3 cents higher than the corresponding ex-rail and ex-lake rate.[5]

The Commission found that rate relation to be lawful under the above sections of the Act. In its own words,

[5]On brief appellant refers to the prescribed differences between the local rates and ex-barge rates as "differentials". (Br. p. 48) That is a misnomer. "Differential" means a difference in rates on like traffic between the same points via one route as compared with another. (See cases cited on page 30 of the Commission's report. (R. 34)) The eastern rate factors as well as the local rate apply over the same route. The difference between the inbound rate by barge and the inbound rate by rail is correctly termed a "differential". If combination barge, rail through rates were in issue under Section 3 (4), which they are not, the difference between those rates and the corresponding all-rail rates would properly be called "differentials". The word "differential" can not properly be applied to the 3-cent rate disparity prescribed and approved by the Commission. The lower court termed that disparity a "rate penalty". (R. 185)

the Commission found the ex-barge rates would be lawful so long as:

> . . . no less favorable to the ex-barge traffic and no more favorable to the ex-rail and ex-lake traffic than is represented by the relation between such prescribed ex-barge proportionals, on the one hand, and the present ex-rail and ex-lake proportionals or specifics, on the other. (Rep. 32; R. 36)

The Commission specifically found that the application of the local rates on ex-barge grain, as proposed, would destroy the traffic. That proposal was condemned and the suspended tariffs were ordered cancelled. (Rep. 25, 32; R. 29, 49)

THE BASIS ADOPTED BY THE COMMISSION FOR ITS ORDER

The Commission concluded that the eastern railroads could lawfully discriminate in their rates between connecting barge lines and connecting rail lines to the extent permitted by its order. It based that conclusion upon a finding that the average circumstances and conditions affecting outbound and through transportation in connection with inbound rail and lake movements were different from those in connection with inbound barge movements. (Rep. 27; R. 31)

In its report the Commission undertook to specify the average differences in transportation conditions on which it predicated its ultimate prescription of ex-barge rates 3 cents higher than corresponding ex-rail and ex-lake rates. (Rep. 27, 28; R. 32) Those specifications and the related findings may be summarized as follows:[8]

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[8] References to page 28 of 262 I. C. C., and to page 32 of the printed record indicate the findings found in the final summary of the Commission's specifications. Reference to other pages of 262 I. C. C., or to other pages of the printed record indicate other findings as to the same matters.

1. The Commission found that in three respects the *average* service performed by the eastern railroads was less in connection with rail and lake carriers than in connection with barge lines,-i. e., (a) less terminal service at the gateway or junction, (b) less transit service at intermediate points in the East, and (c) less line-haul service to the southern portion of central territory. (Rep. 28; R. 32)

(a) The difference in average terminal service occurs because some ex-rail grain moves through Chicago in continuous service, so as to require only an interchange service between rail lines rather than a full origin terminal service, whereas the ex-barge grain always starts its rail journey at that point. (Rep. 21; R. 25) The Commission found that the ex-rail proportionals apply, and will continue to apply, whether the rail traffic is handled in continuous service or stopped at the gateways or other intermediate points. (Rep. 14, 17; R. 18, 21) It also found that transfer of lading and full origin terminal service are always required at the interchange port in connection with lake carriers. (Rep. 18, 25; R. 22, 25)

(b) The difference in *average* transit service occurs because some ex-rail grain is processed on all-rail routes west of Chicago, and consequently moves east of Chicago as grain products, whereas all of the ex-barge grain is processed east of Chicago and moves from Chicago as whole grain. (Rep 22; R. 26) The Commission did not mention the further, undisputed fact that a special transit charge is paid for any transit privilege accorded east of Chicago. (R. 199; Fdg. 28(i), note 37(a)) It did find that the ex-rail rates apply, and will continue to apply, whether or not the ex-rail traffic receives transit east of Chicago. (Rep. 14, 17; R. 18, 21) Ex-lake grain was found to be like ex-barge grain in that it is processed east of Chicago,

principally in Central Territory, and the products thereof move on to eastern, trunkline and New England territories under a transit arrangement. (Rep. 18; R. 22)

(c) The difference in average outbound line-haul service is due to the fact that some rail grain originates at points south and east of the Chicago-Peoria-Ft. Madison, Iowa, line (outside the territory served by barge). In instances when that rail traffic does not move through Chicago, but moves over direct routes south thereof, the through distance is less than via Chicago. All of the barge traffic must move through Chicago. (Rep. 21; R. 25) The Commission further found that the eastern railroads do interchange at Chicago with connecting rail lines bringing grain from southern Illinois origins without difference in rate treatment.[7] (Rep. 13; R. 17) The Commission made no finding of any difference in rail haul to southern central territory, ex-barge vs. ex-lake grain. The grain in both categories is reshipped from the same reshipping point.

The Commission did not order that the application of the ex-rail and ex-lake rates be made contingent upon the amount of terminal service, transit service, or line-haul service to southern central territory received by such ex-rail and ex-lake grain. It did not order any rate higher than the usual ex-rail rate for that portion of the ex-lake and ex-rail traffic which receives the identical transit service, identical terminal service, and identical line-haul service to southern central territory as is received by ex-barge grain for which the higher basis was prescribed. (R. 197, 198; Fdg. 28(b) (c))

2. The Commission found that the inbound rail hauls

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[7] On page 40 of brief, appellant states as to the *ex-rail* adjustment, "The demand has always been for the application of the through rates by way of Chicago even though the direct route would not pass through Chicago."

to Chicago are longer *on the average* than the inbound barge hauls. (Rep. 28; R. 32)

The Commission also found as to the traffic of this appellee from Kansas City that the inbound hauls are relatively long (Rep. 21; R. 24-25) and that the barge hauls are preceded by rail hauls to Kansas City. (Rep. 21; R. 24)

It also found that the ex-lake grain enjoys the same proportional or reshipping rate as is provided on ex-rail grain. (Rep. 18; R. 21) The water haul from Duluth is 808 miles (Rep. 18; R. 21); the barge haul is 722 miles from Kansas City. (Rep. 40; R. 46)

3. The Commission found that the proportional rates which the eastern railroads maintain for their connecting rail lines are a component part of many through rates of different amounts and represent *an average* of varying balances of through rates from long- and short-haul origins. (Rep. 28; R. 32) The Commission did not find that the open proportional which is always used, not only now but at all times in the past, in constructing combination through rates from origins west of the Mississippi River had been arrived at by such process. The history of that proportional (Rep. 14, R. 17) carries not even a suggestion of a relation between the measure thereof and the balances of through rates from origins west of the Mississippi River.

In this connection the Commission also found that the inbound rates of the connecting rail lines had been prescribed by it,[8] (Rep. 12; R. 15) and that the inbound rates

[8]On pages 36 and 38 of brief, appellant uses language which implies that the inbound rates via rail to Chicago were prescribed as components of through rates to eastern trunk-line and New England territories. The fact is that the inbound rates were prescribed for local application to Chicago (not contingent on

of the connecting barge lines yield fair returns and are reasonable. (Rep. 19; R. 23). It found that the proportional rates from Chicago to trunk-line and New England territories are by far the most important in this proceeding, and they are uniform on all ex-lake and ex-rail grain regardless of origin or length of inbound hauls. (Rep. 12, 15; R. 16, 18) It further found that the ex-rail traffic consists of all kinds of grain moving for all distances, long and short, over both direct and circuitous routes. (Rep. 17; R. 21)

4. The Commission found that the rates which the eastern carriers provide for their connecting rail lines are subject to a fourth-section rule, which provides that to trunk-line and New England territories those rates shall apply only when the inbound rate is 8.5 cents or higher. (Rep. 28; R. 32)

In this connection the Commission noted that Section 6(b) of the Transportation Act of 1940 (54 Stat. 904) authorizes the eastern railroads to maintain their present rates on ex-barge traffic even when the barge-rail combination is less than the local rail rate from the reshipping point. (Rep. 30; R. 34-35) It concluded that the rule mentioned should not be made applicable in connection with ex-barge proportionals. (Rep. 32; R. 37)

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movement beyond). In an early report in the *Western Grain* case, 173 I. C. C. 511, 530, the Commission said that Chicago, Peoria, St. Louis, etc., "are to be considered as final terminal destinations, where the shipment under transit ends". The eastern factor to New York was not in issue in the proceeding in which the Commission prescribed rates via rail to Chicago and the Commission was without authority to treat with or consider the combination through rate in that case. That eastern factor is purely a voluntary rate and the lawfulness of the measure thereof has never been passed upon by the Commission in any proceeding; and particularly has never been considered by the Commission in any case from the standpoint of the through rates from the West to the East made by the use thereof.

As to this appellee, the Commission found that no fourth-section situation exists in connection with the present barge-rail rates from Kansas City since the inbound barge rate therefrom to Chicago is 9.5 cents. (Rep. 21; R. 24)

5. The Commission found that the rates provided by the eastern railroads for their connecting rail lines equalize the all-rail rates by various routes and gateways.[9] (Rep. 28; R. 32) It also found that these rates result in through all-rail rates which harmonize with each other and with the local rates in that territory. (Rep. 28; R. 32)

In this connection the Commission found that the Peoria and St. Louis gateways would be entitled upon reasonable request to ex-barge proportionals properly aligned with those approved from Chicago, but that the record did not contain sufficient detail for the prescription thereof in this proceeding. (Rep. 32; R. 36) The Commission made no finding as to whether the through barge-rail rates, either under the present or prescribed ex-barge proportionals, would or would not equalize gateways or harmonize with local rates.

6. The Commission summarized the pricipal differences found by it to warrant ex-barge proportionals higher than ex-lake, as follows (Rep. 28; R. 32): (a) lake grain is chiefly wheat; (b) it has a relatively long haul inbound and is usually preceded by an inbound rail haul; (c) the combination of rail-lake-rail factors conform to the principles which underlie Section 4; and (d) the lake-rail grain can, and generally does, by-pass the Chicago gateway entirely.

In connection with the first three principal differences

[9]Chicago, St. Louis and Peoria are the principal gateways on grain traffic from the West to the East, *Grain and Grain Products*, 205 I. C. C. 301; 215 I. C. C. 83.

summarized above, the Commission found that in these respects ex-lake grain was *like* ex-barge grain from Kansas City (carried by this appellee) but unlike ex-barge grain from Illinois (carried by Mechling). (Rep. 28; R. 32) In its order the Commission prescribed and approved the same rate difference between lake carriers and all barge carriers.

As to the by-passing of the Chicago gateway by lake grain, the Commission found in Table III of Appendix B to its report that during the period 1940 to 1943 (first ten months) 9,865,000 bushels of grain arrived at Chicago via lake. (Rep. 41; R. 48) The Commission found that this grain was attracted thereto by the ex-lake proportionals which apply therefrom to and through points in central territory where the grain is processed and reshipped under transit to eastern trunk-line and New England territories. (Rep. 18; R. 22) The Commission found that the particular differences just summarized "warranted" as to the ex-barge rates a variation "from the ex-rail and ex-lake proportionals." (Rep. 27; R. 32) However, in its ultimate conclusion the Commission fixed precise ex-barge rates for the future in relation to the local rates (Rep. 32; R. 36), and not in direct relation to the ex-rail and ex-lake rates assessed on the traffic received from competing connecting lines. The local rates which the Commission used as the standard for the ex-barge rates prescribed by it never constitute the "rates and charges" assessed by eastern lines on traffic received from connecting rail and lake lines.[10] Having prescribed precise ex-barge rates in direct relation to local rates, the Commission found that the relation thereof to existing

[10] On brief, the appellant states (p. 43): "These [the local rates] are the rates which the Commission used in determining the differentials which should be applied to the ex-barge grain moving out of Chicago.

ex-rail and ex-lake rates which happened to result from that prescription would be lawful. (Rep. 32; R. 36)

In its report, the Commission repeatedly treated with the level and relation of the through rates—inbound barge factor plus outbound rail factor as compared with inbound rail or lake factor plus outbound rail factor—in arriving at the measure of a lawful, separately published outbound factor on ex-barge grain. (Rep. 24-32; R. 28-36) Apparently the Commission thought its only duty in the premises was to fix an outbound factor for ex-barge grain in such amount as would produce a maximum reasonable through barge-rail rate.[11] On brief, the appellant states (pp. 50-51):

> Throughout its report, the Commission was careful to stress the fact that it was treating of a through barge-rail transportation service and that its one concern was to establish a reasonable and non-discriminatory charge for that service. Its task was the same as if it had been called upon to prescribe joint barge-rail rates under provisions of Section 307 (d).

In arriving at its ultimate conclusion, the Commission found that it should be guided by the effect of the rates

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[11] By its order of reopening, the Commission put in issue not only the lawfulness of the separately established proportional rates under Section 3 (4) but also the question of "what, if any, reasonable and otherwise lawful joint rates for the interstate transportation of grain, in carloads, from points of origin served by the A. L. Mechling, doing business as the A. L. Mechling Barge Line, to said eastern destinations, shall be prescribed." (Rep. 9; R. 12) The Commission did not prescribe any joint rates in connection with Mechling. (Rep. 10; R. 14) Insofar as this appellee is concerned, no issue as to joint rates was presented for decision. The Commission directed its findings and order solely to the separately established outbound proportionals to be applied on ex-barge grain from origins served by Mechling as well as origins served by this appellee.

prescribed on the movement of traffic.[12] (Rep. 29; R. 36) In making findings as to that matter the Commission dealt principally with the combined inbound and outbound movements. It found that under the existing equality of outbound factors, traffic had been diverted from all-rail to barge-rail routes via Chicago. (Rep. 29; R. 36) The Commission made no categorical finding as to the effect of the prescribed ex-barge rates made 3 cents higher than the corresponding ex-rail or ex-lake rates. It did find that the higher outbound rate basis would cause some discount in the delivered prices paid at Chicago for ex-barge grain. (Rep. 29; R. 33) Other findings in the report show that the inbound shipper bears the burden of the inbound charges and of any discount in the prices paid in Chicago; and that the shipper elects to use either the barge service or the rail service inbound dependent on the net price received by him at his interior shipping station. (Rep. 16, 22-24; R. 20, 26-27) The effect of the discounted price at Chicago would divert some of the inbound traffic from barge lines to rail lines.

Upon the foregoing findings the Commission based its conclusion that the prescribed difference between the ex-barge proportionals and the ex-lake and ex-rail proportionals would not create such discrimination between connecting carriers as is prohibited by Section 3(4).

The court below found in substance that the foregoing findings do not support the order and have no rational relation to the conclusion that the ex-barge proportional rates should lawfully be higher than ex-rail and ex-lake proportional rates; that the Commission failed to observe and apply standards provided by the Interstate Commerce Act as amended in 1940; and that the order is invalid and should be enjoined.

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[12] Appellant on brief states (p. 63): "In determining a proper level of proportional rates the Commission set out the guiding principle which should govern its ultimate determination. This was fundamentally the effect on the movement of the traffic . . ."

Questions Presented

The order of the Commission prescribed proportional rates for application by the eastern railroads on ex-barge grain. The order further approved the relation between those prescribed ex-barge rates and the lower ex-rail and ex-lake rates maintained in connection with rail and steamer lines that compete with the barge lines west of Chicago.

The ultimate question here, as in most cases involving review of a Commission order, is whether the Commission acted within the limits of its authority and conformed to the statutory standards. However, the specific question presented by the complaint of this barge-line appellee may be stated with greater particularity; to do so will clarify the issue.

> *Do the Commission's findings support its conclusion that the relation between the ex-rail proportionals and the prescribed ex-barge proportionals does not result in a discrimination between connecting carriers within the meaning of Section* 3(4)?

The answer to this question necessarily involves an interpretation of the legal effect of Section 3(4) and an evaluation of the Commission's findings to determine whether they are legally relevant and whether the Commission's order is rationally based upon them. The subordinate questions thereby presented are:

1. Were the circumstances and conditions considered by the Commission applicable under Section 3(4) and the National Transportation Policy?

2. Is the approved difference between ex-barge and ex-rail rates rationally based upon the differences in circumstances and conditions which the Commission found?

SUMMARY OF ARGUMENT

Section 3(4) provides that no common carrier by railroad shall discriminate in its rates or charges between connecting carriers. It further defines the term "connecting carriers" as including *any* common carrier by water and *any* common carrier by railroad. It is the contention of this appellee that railroads are thereby enjoined from differentiating in their rates between connecting rail and water carriers except where such differentiation is reasonably related to differences in the circumstances and conditions surrounding the transportation service. We concede that if one connecting carrier originates the interchanged traffic at a point which is nearer or farther from the point of interchange than the origin at which the other connecting carrier receives the traffic, that fact may be considered by the Commission as a differentiating circumstance under the law. Likewise, if the eastern rail road performs substantially greater service in transporting grain received from one connecting carrier than from the other, that fact may lawfully be considered as a differentiating circumstance. The mere fact that one connecting carrier is a barge line and the other a railroad does not, under the terms of the statute, warrant a difference in rate treatment by the eastern railroads.

The order of the Commission now before the court prescribes proportional rates for application by the eastern railroads to grain reshipped from Chicago ex-barge. The order further approves the relationship between those ex-barge rates and the lower ex-rail proportionals which the eastern railroads presently maintain. Among others, the Commission approves for the Pennsylvania railroad a pro-

portional rate of 29 cents, to be charged for hauling grain from Chicago to New York when that grain is brought from Kansas City to Chicago by the Federal Barge Lines. The order approves the difference between that rate and the 26 cent rate which is charged by the Pennsylvania for transporting grain from Chicago to New York when it is brought from Kansas City to Chicago by the Alton railroad. The court below found that this order was not based upon sufficient findings of legally relevant circumstances and conditions differentiating the ex-barge service from the ex-rail service.

I.

A. Taking the findings of the Commission at face value, and assuming that they are substantially supported by the evidence, the report shows that the Commission found that the transportation service performed by the eastern railroads is substantially the same, ex-barge as ex-rail. However, the Commission found that, on the average, the eastern railroads performed more service on ex-barge grain than on ex-rail grain in respect to terminal service at the gateway, transit service east of the gateway, and line-haul service to southern central territory points. It further found that the average inbound barge haul from river origins is shorter than the average of the inbound rail hauls from all origins.

Other findings in the report show that not a single one of these differences holds true when ex-barge grain and ex-rail grain from the same origins are compared, and when the ex-rail grain demands and receives the services and privileges authorized by the rate tariffs. The present proportionals apply alike on ex-rail and ex-barge grain from Kansas City, both of which receive full origin

terminal service at the Chicago gateway, transit service east of the gateway, and precisely the same inbound haul. The same is true as to ex-barge grain from Illinois origins and this is likewise revealed by the Commission's report. As to the Illinois grain, the report further shows that the same line-haul service to southern central territory points is provided on ex-rail grain moving over circuitous routes as on ex-barge grain.

B. The Commission apparently recognized the total similarity of ex-barge and ex-rail traffic in these respects, when like is compared with like. For it averaged these circumstances as to ex-barge grain from river origins and then compared that average with the average of all-rail grain, not only from those origins, but from all origins served by railroads throughout the west and northwest. Those average differences are cited as justifying the Section 3(4) discrimination. They are not legally relevant under the statute.

The statute defines a connecting carrier as "any" common carrier by water. It thereby confers upon an individual common carrier, such as the Inland Waterways Corporation, the right to non-discriminatory treatment when compared with a particular railroad, such as the Alton railroad. This is because the only discrimination which affects Inland Waterways Corporation is the discrimination between it and a connecting railroad with which it competes.

To hold otherwise would be to deprive the statute of any sensible meaning.

Consequently, to average all water lines and then compare the result with the average of all rail lines, regardless of competitive relationships among them, is to subordinate individual comparisons to irrelevant averages. Such collective treatment essentially amounts to

treating connecting carriers according to types, and that is forbidden by the statute.

C. The National Transportation Policy provides for fair and impartial regulation of all modes of transportation so as to recognize and preserve the inherent advantages of each without unjust discrimination or unfair or destructive competitive practices. That policy does not require, but prohibits, the separate, collective treatment of all barge lines and all railroads so as to limit the protection of Section 3(4) to the average circumstances thus found. That policy does not qualify the individual rights of individual carriers which suffer from the discrimination prohibited by Section 3(4).

In other words, when the policy prohibits unfair competitive practices it refers to just such a practice as is approved by the Commission in this case. That practice consists of the eastern railroads charging more for the same outbound movements when performed for a barge line than when performed for a railroad. The eastern railroads have no interest in the barge-rail competition in western territory where they do not operate. Yet they aid their kindred western railroads by thus creating an artificial impediment to the traffic of the barge line.

D. The inherent advantage of barge service is its lower cost. That advantage is not recognized and preserved by the order of the Commission; rather, the Commission imposes a surcharge or penalty against the onmovement of the ex-barge grain which offsets the inherent advantage of the lower cost service up to Chicago. Since that surcharge or penalty is not found to be warranted by true differences in transportation circumstances and conditions relevant to the issue under Section 3(4), the Commission administered that section in a manner contrary to the National Transportation Policy.

E. The Commission in its report mentioned certain other "rate making circumstances" which it found in the detailed features of the all-rail rate structure. It purportedly based its order upon these circumstances. The position of this appellee is that no difference in rates between connecting carriers is justified by the fact that the ex-rail proportional is an average factor representing the outbound portion of varying through rates from different origins. Nor is such difference justified by the fact that the combination through all-rail rates harmonize with each other, or that the various gateways are equalized by such combinations. Appellee contends that whatever the ex-rail proportional may be, and however it may be arrived at, the eastern railroads may not charge a different proportional in connection with this appellee unless that difference is warranted by a difference in the transportation. Appellee does not claim that it is entitled to any particular proportional; it neither supports nor assails the measure of the present ex-rail proportionals. But if that proportional is applied in connection with the Alton railroad from Kansas City, this appellee is entitled to no less favorable treatment as to its operation from Kansas City.

F.—G. The mention made by the Commission in its findings as to the fourth section rule of the railroad tariffs is utterly inexplicable in view of Commission's own conclusion that this section of the Act does not apply to the rates and rate relationships involved in this case. As the Commission found, Section 6(b) of the Transportation Act of 1940 saves and cures all of these rates from the provisions of the fourth section of the Act. In order to set this matter at rest, however, it should be stated that as a matter of law Section 4(1) does not apply to a combination barge-rail rate which is lower

than the local all-rail rate from the intermediate reshipping point.

II. Nowhere is the arbitrary character of the Commission's order more clearly revealed than in that portion of its findings which compares ex-lake with ex-barge grain. Here the Commission finds that as to every one of the characteristics noted ex-lake grain is precisely similar to ex-barge grain from Kansas City, although it is dissimilar to ex-barge grain from Illinois origins. Yet that fact is given no effect whatever in the order which the lower court set aside. Just as significant is the further fact that the order of the Commission continues ex-lake grain on the same proportional rate basis as the ex-rail grain even though ex-lake grain is different from ex-rail grain in all of the respects in which the Commission found ex-barge grain to be different from ex-rail grain. There is no rational relation between the facts found and the rate relations prescribed.

II.

A. The Commission decided this case as if it had only one concern and that was to prescribe an outbound rail factor which would produce maximum reasonable through rates when added to the inbound barge rates. In so doing, it so far subordinated the requirements of Section 3(4) that it actually read that section out of the statute. The lower court held, and this court is asked to affirm, the proposition that the Commission must require the railroads to conform to all sections of the statute. Mere conformance of a rate to tests of reasonableness under Section 1 is not enough if the reasonable rate contains a prohibited discrimination among connecting carriers within the meaning of Section 3(4).

B. Section 3(4) requires that charges on the traffic received from one connecting line shall be properly related to the charges provided on traffic received from other connecting lines, allowances being made for differences in transportation circumstances and conditions, if any. The Commission did not discharge its function and duty under Section 3(4) when it related the ex-barge rates prescribed by it to the corresponding local rates. Such local rates do not constitute the rates and charges assessed by eastern railroads on traffic received from any connecting line.

C. The Commission sought to produce through barge-rail rates nicely related to the through all-rail combination. It considered as its guiding principle the effect of the various combinations upon the movement of traffic over the barge-rail and all-rail routes. In so doing, the Commission acted beyond the limits of its statutory authority because it failed to give effect to the requirement of Section 3(4) that no carrier shall discriminate between connecting lines in the separately established rates and charges provided by it for the on-movement of traffic received from such connecting lines. It is true that in prescribing reasonable rates under Section 1 of the Act the Commission is required to give due consideration to the effect of those rates upon the movement of traffic. This is specifically provided in Section 15a(2). But that section requires consideration of the effect upon the movement of the traffic *by the carrier for whom the rates are prescribed*. The Commission did not look in this case to the effect on the movement of traffic by the eastern railroads. Yet those are the railroads for whom the proportionals were prescribed. The fact that the prescription of non-discriminatory proportional rates might have an effect upon the movement of traffic as between the com-

peting connecting carriers in the west is a fact that is not legally relevant to the Section 3(4) issue.

III.

The lower court did not transgress on the administrative domain, but exercised its proper judicial function of reviewing the findings which the Commission made to determine whether those findings support the Commission's order as a matter of law. The court found that the Commission had based its order on findings of facts that were legally irrelevant to the issue before it. It correctly concluded that the order must be set aside.

IV.

The order of the Commission finds no support in the previous decision of this court in the case of *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671. In that case, the court held that the Commission had not prescribed proportional rates for ex-barge application and had not approved such rates under Section 3(4). In this case the Commission has expressly prescribed such rates and approved their relation to the ex-rail rates under that section.

In the previous case, appellees were found to claim that they are entitled, as a matter of law, to the existing rates; those rates included inconsistencies which were clearly not justified by the widely disparate factual circumstances involved. For example, the existing rates provided for the application of the northwest proportionals to Illinois ex-barge grain, although the traffics move from widely separated origin territories. No appellee here claims the continuance of such a rate structure.

In the cited case, this court held that Section 3(4) of the Act does not entitle a connecting carrier to the same proportional as is provided in connection with other connecting carriers regardless of differences in circumstances and conditions. The decision did not hold that the circumstances and conditions relied upon by the Commission in this case were legally relevant under that section. It is that further question which is now presented to the court for decision.

ARGUMENT

I. The findings of the Commission do not support its conclusion under Section 3(4).

The principal question presented by the complaint is whether the facts found by the Commission support an order approving the rate relation which the Commission fixed between ex-barge grain on the one hand, and ex-rail or ex-lake grain on the other. To answer that question we analyze every finding to ascertain (a) whether the report truly shows any difference in fact between the competitive traffics for which Section 3(4) requires non-discriminatory rates, (b) whether the prescribed rate relation is responsive to, or rationally based upon, the facts found and (c) whether the fact found is relevant as a matter of law under Section 3(4) and the National Transportation Policy.

In making this analysis, we are primarily concerned with the report as it applies to the complaint of this appellee which relates wholly to the relation between the proportionals prescribed on ex-barge grain from Kansas City on the one hand, and on the other hand the proportional provided for ex-rail from the *same* origin, and the proportionals provided for ex-lake grain from any origin when reshipped to eastern trunk line and New England territories. This phase of the case is virtually ignored by appellant on brief.[13]

[13] For example, appellant's description on brief of the basis for and history of the all-rail adjustment is confined to rates from Illinois origins. (Br. p. 41, 43, 44) In discussing the fourth section situation (Br. p. 45-48) the appellant ignores the non-

This appellee emphasizes the facts in its own case, not to distinguish its rights from those of the Mechling Barge Line, since it believes the rights to be common, but to illustrate the arbitrary and superficial manner in which the Commission dealt with the issues before it.

A. THE REPORT DOES NOT TRULY FIND DIFFERENCES IN TRANSPORTATION CIRCUMSTANCES AND CONDITIONS SURROUNDING THE COMPETITIVE TRAFFIC BROUGHT FROM KANSAS CITY TO CHICAGO BY THIS APPELLEE AND THE RAIL LINES WITH WHICH IT COMPETES.

The specific facts and circumstances which the Commission found and relied upon as warranting the rate differences prescribed and approved by it are stated in numbered paragraphs of its report at 262 I. C. C. 28. (R. 32). They are summarized in the statement above (pp. 7 to 14, *supra*) together with all pertinent subordinate findings and facts necessary to a determination of the questions presented.

Four of the principal differences found by the Commission relate to certain conditions incident to the inbound haul of this appellee and competing railroads, or

applicability of its argument to the rate adjustment from Kansas City. Appellant treats with the varying proportionals to central territory as if the tariff provisions now in effect on ex-barge grain from Illinois likewise govern ex-barge grain from Kansas City (Br. p. 35, 38-39) although the fact is to the contrary. (Rep. 13, 20; R. 16, 24) Appellant suggests that the "barge transportation in question" is intrastate commerce (Br. p. 48, n. 11), which could not possibly be true as to barge transportation from Missouri to Illinois. Appellant argues that conditions surrounding the transportation of ex-barge grain are different from those surrounding the transportation of ex-lake grain. (Br. p. 56-57), and advances grounds which, even if relevant and true—both being denied by the appellees—could apply only to ex-barge grain from Illinois and not to ex-barge grain from Kansas City.

to the outbound haul performed by the eastern railroads. The Commission found that these were differentiating circumstances because it found differences in the average conditions when combined for all of the all-rail grain and for all of the barge-rail grain, regardless of particular origin or competitive movements. Specifically, the Commission found that ex-barge grain was different from ex-rail grain (excluding ex-lake grain for the time being), because there is, on the average:

1) More terminal service at the gateway on ex-barge grain.

2) More transit service east of the gateway on ex-barge grain.

3) Less line-haul service on ex-rail grain moving over direct routes to destinations in the southern part of central territory, than on ex-barge grain moving over circuitous barge-rail routes.

4) Shorter inbound hauls via barge than via rail.

Other findings on the face of the report show that not a single one of these differences exists when the ex-rail grain (a) originates at the same point as the ex-barge grain, (b) moves inbound to Chicago via the particular rail lines with which the barge line is in competition from such origin, and (c) is stored in transit at Chicago with a view to subsequent reshipment in the usual course of merchandising as is its right and practice under the tariff. The Commission finds that ex-rail grain that *is* stored in transit and receives a full origin terminal service at the Chicago gateway is given the same reshipping rates as if not so transited (Rep. 14; R. 18); it finds that the same proportionals are provided for ex-rail grain that moves over circuitous routes via Chicago as for ex-rail grain moving over the direct routes (Rep. 13, 17; R. 17, 21); and it finds that the reshipping rates to

eastern trunk-line and New England territories apply on ex-rail grain from all origins, regardless of the length of the inbound haul. (Rep. 17; R. 21) As to transit service east of Chicago, the Commission found that the proportionals apply on ex-rail grain regardless of whether or not transit is taken at intermediate points. (Rep. 14; R. 18) The Commission neglected to mention the undisputed fact that when transit is taken, an additional charge over and above the line-haul rate is assessed. (R. 199; Fdg. 28(e), note 37(a)) On the face of the report, therefore, it is plain that all ex-rail grain will continue to enjoy the 26-cent reshipping rate to New York. It is equally plain from the report that such ex-rail grain includes grain that is transited at Chicago and receives a full origin terminal service at that point, moves over circuitous routes via Chicago; moves from short haul western origins; and is transited at points intermediate east of Chicago. It follows that the four differences specified by the Commission are not true differences in circumstances between the traffic of connecting inbound carriers and the general finding of the Commission in regard thereto does not support its order.

B. FINDING OF DIFFERENCE BETWEEN AVERAGE EX-RAIL TRAFFIC AND AVERAGE EX-BARGE TRAFFIC IS NOT LEGALLY RELEVANT UNDER SECTION 3(4).

Assuming, *arguendo*, that there are differences in respect to the four circumstances just considered when all of the all-rail grain is averaged and compared with the average for all of the ex-barge grain, the Commission's findings to that effect are not legally relevant under Section 3(4).

Section 3(4) prohibits discrimination between connecting carriers, including both common carriers by rail and by water. Rail grain originates at Kansas City, moves therefrom to Chicago, and a transit privilege (a stop for

temporary storage or for processing) is provided at that point without charge other than the line-haul rate. That movement via a connecting rail line is given a 26-cent proportional rate to New York. Barge grain moving to Chicago and reshipped therefrom under identical conditions from beginning to end must pay 3 cents more, or 29 cents. The differences found by the Commission provide no rational support for the order which prescribed those rate discrepancies for this competitive traffic.

The Commission by the findings above summarized concedes the lack of difference when the comparison is limited to connecting carriers hauling from the same origin. It therefore averages all of the ex-barge grain (from Kansas City and Illinois River points) on one side of the equation, and all of the ex-rail grain (from all western, southwestern, and northwestern states) on the other side of the equation. This is irrational under Section 3(4). That section, as amended in 1940, protects "any" common carrier by water. This appellee or any other individual water carrier is entitled to complain in its own right and is entitled by statute to have only its own circumstances considered on the barge side of the equation. Similarly, the carriers in whose favor discrimination may not be practiced include "any" carrier by railroad. The complaint of this appellee is directed squarely to the more favorable charges on the traffic of the particular carriers which operate from Kansas City to Chicago. Only their conditions may be considered on the rail side of the equation if proper meaning is given to the word "any" in Section 3(4).

In *North Carolina* v. *United States*, 325 U.S. 507, 89 L. ed. 1760, this Court set aside an order of the Commission entered under Section 13 which required railroads in North Carolina to increase their intrastate passenger fares to

the same level per mile as the Commission had found reasonable for interstate application. The state authority had permitted some railroads to make effective fares of 2.2 cents per mile, the same as the Commission had found reasonable for interstate application. However, four railroads were refused permission to increase their intrastate fares above 1.65 cents per mile. The order of the Commission required the four carriers to make an increase to 2.2 cents per mile. The Commission contended that its order was supported by its general conclusion that intrastate fares below 2.2 cents per mile discriminated against the interstate commerce. This Court held that such conclusion, if based on findings supported by evidence, would justify the order. Nevertheless, the order was set aside because the Commission failed to make specific findings to support a conclusion of discrimination against interstate commerce on the part of the "particular" railroads involved in the order. Discrimination in the instant case, as in the case cited, is personal; it is peculiar to the individual receiving the alleged unwarranted favor on the one hand and, on the other hand, the individual or individuals subjected to the alleged unwarranted disadvantage.

When the Commission tested the lawfulness of the reshipping rate relations by averaging conditions from all western, northwestern, and southwestern states for railroads, and by averaging conditions from Kansas City and Illinois River points for barge lines, it took into consideration facts which could not legally influence its judgment. In so doing, it acted arbitrarily and beyond the limits of its authority under the standards provided by the Act.

To the extent that the Commission based its order upon the average circumstances of all carriers in a group, and failed to consider the particular conditions of this appel-

lee and the individual railroads with which it competes, its order must fall for the same reason that this court condemned the order in *North Carolina* v. *United States*, 325 U.S. 507, 518.

C. THE COMMISSION'S METHOD OF TESTING RATE RELATION BY SEPARATE AVERAGES OF DIFFERENT MODES OF TRANSPORTATION IS NOT REQUIRED BY THE NATIONAL TRANSPORTATION POLICY.

The Commission states (Rep. 31; R. 35):

> The ex-barge traffic cannot be averaged with the ex-rail transportation and accorded the same outbound proportional if, as the Act requires, the inherent advantage of each form of transportation is to be preserved, for to do so would not only give full effect to the lower inbound costs but, in addition would extend to the barge-rail transportation most of the advantages of all-rail transportation.

Appellant discusses the National Transportation Policy at pages 30 to 35 of brief. No mention is made there of the above finding. It apparently means that a barge line complaining under Section 3(4) is not entitled to have the particular circumstances of its traffic compared with the particular circumstances of the traffic carried by the rail line with which it competes. Rather, the Commission holds that carriers via different modes of transportation must be treated collectively, according to groups, regardless of whether or not they operate in the same field or compete with one another. One group should include all connecting barge lines, although one of them competes with the Rock Island Railroad operating from Morris to Chicago, and the other competes with the Alton Railroad and similar carriers operating from Kansas City to Chicago. The other group should include all connecting railroads, although some serve southwestern, far western, and northwestern origins where no water

carriers operate, and others do compete with the barge lines from Morris and Kansas City. This is the equivalent of finding that mere difference in mechanical means of transport by connecting lines—by water in the case of one and by rail in the case of the other—is a distinguishing circumstance under Section 3(4) which alone serves to put beyond the reach of judicial review whatever rate disparity the Commission sees fit to approve. This stretches the doctrine of administrative finality beyond the breaking point.

No such requirement can be read into the National Transportation Policy. It provides for "fair and impartial regulation of all modes of transportation" so as "to recognize and preserve the inherent advantages of each." Those provisions do not require that all carriers of a given mode be collectively averaged in separate groups, when the protection of Section 3(4) is being considered. Rather, they forbid such treatment.

The object of the policy, among other things, is to "promote economical and efficient service" and "foster sound economic conditions in transportation and among the several carriers." That does not authorize the Commission to ignore the right of individual carriers; rather it recognizes the right of individual carriers to impartial regulation.

An additional object is to encourage the establishment and maintenance of reasonable charges "without unjust discriminations" or "unfair or destructive competitive practices." That does not qualify the right of "any" connecting line to complain of discrimination within the meaning of Section 3(4). Rather it recognizes the unfairness of an eastern railroad differentiating in its rates between connecting carriers solely because of differences in the type of carriage employed.

The statement quoted above recognizes that the averaging process for determining ex-rail proportionals confers "advantages" on rail traffic from the particular origins served by the appellee barge lines. The Commission withholds those "advantages" from traffic brought to the same reshipping point by the appellee barge lines from the same origins. That is squarely in the teeth of the prohibition of Section 3(4).

The Commission reads the National Transportation Policy as if it amended Section 3(4) so as to approve discrimination between connecting lines of different types. The legislative history of the 1940 amendment shows that Congess had a contrary intention. Congress intended to require the same treatment of a connecting water line as of a connecting rail line, unless transportation conditions incident to the services performed on the respective traffics of the individual carriers warrant a rate difference.

The Commission also says (Rep. 31; R. 35):

> However, all of the ex-barge traffic can and should be accorded uniform proportionals reflecting average conditions surrounding barge-rail transportation, to promote its movement by meeting so far as practicable the commercial needs thereof, just as ex-rail traffic, for similar reasons, had been accorded uniform proportionals reflecting average conditions surrounding the all-rail transportation.

This appellee contended before the Commission that the proportionals to eastern trunk-line and New England territories should be uniform for the Mechling traffic from Illinois and for appellee's traffic from Kansas City. It did so only because precisely that same treatment is provided for the traffic of rail carriers which originates at Morris and Kansas City, respectively. It contended to the Commission that that similarity of circumstance

justified like treatment for ex-barge grain. That, however, was secondary to its prime contention that the eastern proportionals on its traffic should not differ from those provided on the traffic of competing rail lines serving the same point of origin, Kansas City, to any greater extent than might be warranted by the circumstances and conditions under which the competitive traffics moved. This appellee does not compete with the Mechling barge line in transporting grain from Illinois origins and would not object to a proportional on the Mechling traffic either higher or lower than that on the traffic of appellee, if the circumstances warrant.

D. THE COMMISSION, WITHOUT WARRANT, FAILED TO "RECOGNIZE AND PRESERVE" THE ADVANTAGES OF LOW-COST WATER TRANSPORTATION AS REQUIRED BY THE NATIONAL TRANSPORTATION POLICY.

Appellee submits that the Commission acted arbitrarily because on the face of its report it failed to observe and apply the standards of Section 3(4). The requirements of the National Transportation Policy are relied upon only because they spotlight that failure.

Appellant agrees that the inherent advantage of water transportation is its lower cost. (Br. pp. 31, 33) That inherent advantage is offset in part by the extra expense of trucking grain to the river bank from Illinois producing points. (Rep. 22, 40; R. 26, 48) In the case of grain from Kansas City, which originates away from the river bank, that inherent advantage is offset in part by extra switching and loading charges. (Rep. 23; R. 27) In case of a through movement from Kansas City to a processor at Cleveland, that inherent advantage is offset in part by the additional expense of 3.5 cents incurred as an incident to the transfer from barge to car, a transfer not necessary when all-rail grain moves in continuous service.

(Rep. 23; R. 27) The net advantage, after these offsets, is the direct product of the difference between the inbound rates to Chicago by barge as compared with via rail. That net advantage is recognized when the grain is delivered at Chicago under the existing adjustment. The ex-barge grain now sells at a parity with ex-rail grain and the shipper enjoys the full benefit of the net saving in inbound transportation rates and charges. (Rep. 23; R. 27) When the same outbound rates are applied on both ex-barge and ex-rail grain, as at present, that net advantage of the low cost water service to Chicago is preserved and reflected in the combination through rates to ultimate destination. It is not preserved when the ex-barge rate is made 3 cents higher than the ex-rail rate. This shows an administration of the act at variance with the National Transportation Policy since the Commission failed to find any true differences in transportation circumstances relevant to the issue under Section 3(4) which could possibly warrant it in imposing a rate disparity east of Chicago so as to offset the net inbound rate advantage of the water service.

E. FINDINGS OF SO-CALLED "RATE MAKING" CIRCUMSTANCES NOT LEGALLY RELEVANT UNDER SECTION 3(4).

We have discussed above the differences which the Commission found in the average transportation conditions as between different types of connecting carriers. We point out that average differences do not warrant rate differences between individual carriers. Further, the Commission made no finding of any difference as between connecting rail and barge lines from the same origin.

In addition, the Commission found that there were certain "rate-making circumstances characteristic of the

all-rail traffic, but not of the barge-rail traffic." These differences may be stated as follows:

5) The uniform ex-rail proportional represents an average of the varying proportionals which would be produced if the proportional for each origin—some near to and some far from Chicago—were based on a through mileage scale.[14]

6) The uniform ex-rail proportional is the component part of many through rates of different amounts which vary with the lengths of inbound haul and the western factors applicable thereto.

7) The uniform all-rail proportionals from gateways (Chicago, Peoria, and St. Louis) when added to inbound rail rates produce the same combination through rate via each gateway, which is called equalization.

8) The combination of rail factors to and from Chicago results in through rates which harmonize with each other and with local rates in official territory.

9) The uniform ex-rail proportional applies only when the inbound rate via rail is 8.5 cents or higher.

These circumstances or characteristics have no legal relevancy to the Section 3(4) issue. This is made plain by analyzing the alleged difference found in the statement that the ex-rail proportional represents an average of proportionals that vary with the length of the inbound haul.

This finding has to do with testing the measure of a proportional rate by treating it as a portion of a through rate constructed under a mileage scale from western origins to eastern destinations. In such case, the proportional for the eastern haul will be larger when the

[14] The calculations on which the Commission predicates this finding are shown on pages 15 and 16, and in Tables III, IV, and V to Appendix A to its report. (R. 19, 44, 45, 46.)

inbound haul is short, and smaller when the inbound haul is long. This is because rates proportioned to distance by a mileage scale show a decreasing rate of progression for longer hauls. The rate for a given number of miles at the end of any particular haul is therefore less when the through distance is long than when it is short.

The Commission here observes that, tested in the manner just described, a higher proportional from Chicago to New York will result for grain originating at Morris than for grain originating at Kansas City. Similarly, the proportional for grain originating at Kansas City will, in turn, be higher than for grain originating in Montana, Colorado, or Texas. (Rep. 15-16; R. 19)

The Commission thus finds that the eastern railroads have averaged such varying proportionals so as to provide a uniform proportional for ex-rail grain from all origins. This means that the Chicago, Rock Island & Pacific Railroad bringing grain from Morris, Ill., to Chicago obtains a proportional lower than it would if the traffic from Morris were considered separate and apart from grain from other origins. Likewise, the traffic brought by the Alton Railroad from Kansas City to Chicago secures a proportional somewhat lower than if the reasonable measure of that proportional were determined by considering Kansas City only. And, as to far western origins, that rail traffic pays proportionals somewhat higher than the reasonable measure of a proportional determined solely for the far western origins.

Under Section 1 of the Act, it is unquestionably within the Commission's authority to consider the foregoing matters and to fix whatever proportional is required by conditions surrounding the traffic from a particular origin, even though other origins and other traffic may be pro-

vided by the carriers with relatively lower proportionals. Under Section 3(4) the circumstance noted has no relevancy to the relation of rates between connecting carriers that haul from the same origin. If the proportional on grain brought to Chicago from Kansas City by the Alton Railroad is lower than a maximum reasonable proportional, whether that results from an averaging process or from any other method of fixation, Section 3(4) guarantees to this appellee a proportional equally below the maximum reasonable basis, provided always that there is no other difference in relevant circumstances which justifies a rate difference.

The additional differences found in "rate-making circumstances" have no rational connection with the rate discrepancies prescribed and approved by the Commission.

The fact that the ex-rail proportional is the component part of many through rates of different amounts which vary with the length of the inbound hauls and the western factors applicable thereto does not differentiate the ex-barge from the ex-rail traffic. It is equally true of any ex-barge proportional whether made the same as the ex-rail proportional or 3 cents higher. When any factor east of Chicago is added to western local rates which vary because of the difference in the lengths of the inbound haul, the through rates are bound to vary in an equal degree.

The gateway equalization in the all-rail rate structure does not touch, even remotely, the rate discrimination which the Commission prescribed and approved. It may be, although the Commission does not so find, that the gateway equalization has resulted in an ex-rail proportional from Chicago that is lower than it would be if Chicago were considered independently and without regard to equalization. If so, the inbound traffic of this

appellee is entitled to equally favorable treatment unless there is a difference in other relevant circumstances which justifies a rate difference. Otherwise, a mere difference in mode of inbound transportation is sufficient to warrant the rate discrepancies prescribed by the Commission. To illustrate: Assume that rail carrier "A" operates from Kansas City to Chicago, but does not serve Peoria and St. Louis. Rail carrier "B" operates from Kansas City and serves not only Chicago, but also Peoria and St. Louis. In that situation, suppose the eastern railroads applied a higher reshipping rate from Chicago when in connection with carrier "B" than in connection with carrier "A," so as to equalize the several gateways served by "B." It is not conceivable that under those facts alone the Commission would approve the resultant rate difference as a necessary incident to the Peoria and St. Louis equalization. On the face of it, the two would have no relation. There is the same lack of relation when considering ex-barge in comparison with ex-rail traffic.

In this connection the Commission noted that Peoria and St. Louis would be entitled on reasonable request to ex-barge proportionals properly aligned with those approved from Chicago. However, it found that the record did not contain sufficient detail for the prescription of such proportionals in the proceeding before the Commission. That is no fault of this appellee, who is only concerned with preventing a discriminatory adjustment at Chicago. This appellee is entitled to have the proportional adjustment east from Chicago properly adjusted in conformity with Section 3(4), regardless of what may be reasonable or otherwise proper as to ex-barge proportionals from St. Louis and Peoria.

The next finding made by the Commission is that the ex-rail proportional combines with inbound interstate rates

to result in through all-rail rates which harmonize with each other and with local rates in official territory.

What the Commission meant by "harmonize" is not made clear, and there is no finding that the existing adjustment on ex-barge traffic does not so harmonize. If the Commission referred to the difference in relative levels for through hauls, its very order creates disharmony. It is impracticable and impossible to provide any adjustment of through barge-rail rates which will not be relatively less than the corresponding all-rail rates, and, at the same time, preserve and reflect the inherent advantage of low-cost barge transportation.

Furthermore, the question before the Commission under Section 3(4) was utterly foreign to the relation of through barge-rail to through all-rail rates. That point is developed in the next section of this brief.

F. THE ORDER IS NOT RATIONALLY BASED UPON FINDING THAT EX-RAIL PROPORTIONAL IS SUBJECT TO FOURTH-SECTION RULE.

The final "rate-making circumstance" listed by the Commission as differentiating ex-barge and ex-rail traffic has to do with the so-called fourth-section rule in the railroad proportional rate tariff. This rule requires a minimum inbound rail rate of 8.5 cents to make the proportionals apply. The rule does not apply to ex-barge or ex-lake grain. We show that this circumstance has no legal effect upon the Section 3(4) issue. It should be noted first, however, that the order of the Commission approving higher rates, ex-barge than ex-rail, bears no rational relation to this circumstance but is wholly arbitrary and capricious so far as Section 4 of the Act is concerned.

In the first place, the stated difference is not true as to this appellee because the inbound barge rate from Kansas

City to Chicago is in excess of 8.5 cents and does not come within the operation of the rule. On the other hand, the inbound rate of Mechling is 2 cents, due to the shorter water haul from Morris. In this situation, the order of the Commission prescribed an identical outbound proportional in connection with ex-barge grain moving on both these inbound rates. Thus, the Commission is in the position of supporting a difference in rates between connecting rail lines and water lines by a difference that does not exist as to one water line. The order is not rationally related to the facts.

Secondly, the order prescribes proportional rates which do not themselves meet the test of the fourth-section rule cited by the Commission. Mechling is the only carrier as to which the circumstance could possibly have any bearing, and Mechling's 2-cent rate is 6.5 cents less than the 8.5-cent minimum called for in the rule. Yet the prescribed ex-barge proportional is only .3 cents higher than the ex-rail proportional. Consequently, under the prescribed proportional the rate will still be 3.5 cents short of the goal which that rule sets up. A circumstance further illustrating the arbitrary nature of the Commission's order.

G. FINDING AS TO THE SO-CALLED FOURTH-SECTION RULE IS LEGALLY IRRELEVANT UNDER SECTION 3(4).

It is plain on the face of the Commission's report and from the effect of its order that it did not consider either the fourth-section rule in the tariff or Section 4 of the Act as constituting legal justification for the difference in rates between connecting carriers. Yet in the absence of legally relevant differentiating circumstances that would warrant the rate relationship prescribed, the Commission clung to the circumstance stated in this connection, and

on brief appellant urges that Section 4 of the Act supports the rate relationship which the Commission approved. (Brief of appellant, pp. 45-48) For that reason it should be stated clearly and unequivocally that the appellee's right to non-discriminatory treatment by a connecting carrier is not modified by Section 4.

1) The law specifically exempts this situation, as the Commission conceded. (Rep. 32; R. 37) It there found that under Section 6(b) of the Transportation Act of 1940 (54 Stat. L. 904; 49 U.S.C. sec. 4, note) the existing combinations are not prohibited by Section 4(1) of the Act as amended, even though lower than the local rates from Chicago to the same destinations. That finding disposes of the matter completely, but if it did not there are additional propositions that support our view.

2) The combination of the existing factors on grain transported by this appellee to Chicago and reshipped therefrom by rail exceeds every one of the local rates from intermediate origins and the Commission so finds. (Rep. 20-21; R. 24) The fourth section is inapplicable, no matter how construed. This appellee has its individual rights under Section 3(4), although they were ignored by the Commission in its report and are not mentioned by the appellant in its brief. This appellee assails the validity of the Commission's order as applied to reshipping rates on the grain which it transports to Chicago. When a particular circumstance relied upon by the appellant as supporting its order does not in fact pertain to the traffic of this appellee, the appellant should so state.

3) Even though Section 6(b) of the Transportation Act of 1940 had not been enacted, Section 4(1) would not apply here because the higher rate from an intermediate point is the local rate of a railroad, and the lower through rate from a more distant point is a combination of a water

rate factor to a reshipping point and a separately published railroad proportional rate beyond. It is the difference of 8.5 cents between the railroad's local and proportional rates which makes possible a through rate less than the local rates. That difference is wholly within the control of the eastern lines, and a barge line cannot be held responsible for any fourth section departure that may result from adding its reasonable and compensatory inbound rate to the eastern factor maintained by another carrier. Section 4(1) defines a particular kind of preference and prejudice. *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U.S. 1, 22. This Court has held that a carrier cannot be held responsible for preference and prejudice unless it controls both the rate alleged to be prejudicial and the rate alleged to be preferential. *Central Railroad Co. of New Jersey* v. *U. S.* (1921), 257 U.S. 247.

4) Section 3(4) confers a right on this appellee to be free from discrimination practiced against it by eastern railroads. It should not and cannot be deprived of that right on the ground that the removal of the discrimination by one of the alternative means open to the eastern lines would result in violations of other sections of the Act. *American Fruit Co.* v. *Rapid City D. H. & W. R. Co.*, 163 I.C.C. 211; *Wise-Peterson Box Co.* v. *M. & O. R. R. Co.*, 46 I.C.C. 693, 696.

Finally, to set up Section 4(1) as a barrier to equal treatment of connecting rail lines and barge lines when the transportation circumstances merit equal treatment would be to subordinate the general and all-inclusive prohibition of Section 3(4) to the incidental provision in Section 4(1). Sections 3 and 4 must be accorded a harmonious construction. *United States* v. *Louisville & N. R. Co.*, 235 U.S. 314.

H. THE ORDER IS NOT RATIONALLY RELATED TO DIFFERENCES BETWEEN EX-LAKE AND EX-BARGE GRAIN.

The arbitrary character of the Commission's order is illustrated most clearly when we come to analyze the findings which it made as between ex-barge and ex-lake grain. The similarities and differences found by the Commission (Rep. 28; R. 32) are set out in the statement above and may be paraphrased as follows:

> 1) Lake grain from the Northwest consists chiefly of wheat. This is also true of barge grain from Kansas City, but is not true of barge grain from Illinois.
>
> 2) Lake grain from the Northwest has a relatively long water haul inbound and is usually preceded by an inbound rail haul. That is also true of barge grain from Kansas City, but is not true of barge grain from Illinois.
>
> 3) The rail-lake combinations in general confirm to the principles which underlie Section 4. That is also true as to the barge grain from Kansas City, but it is not true as to barge grain from Illinois.

Insofar as this appellee is concerned, the foregoing findings relate wholly to *similarities* and not to differences. Yet in the face of these similarities the Commission prescribed and approved on the traffic of this appellee the identical rate relation as on the traffic of the Mechling Barge Line, which serves the Illinois origins found to be handled under dissimilar circumstances. Moreover, the Commission approved in connection with this appellee proportionals higher than ex-rail, although the ex-lake grain continues to receive the same proportional as ex-rail. The stated findings provide no rational basis for such result.

The Commission makes one additional finding as to a difference in conditions between ex-barge and ex-lake. It finds that the barge-rail grain always moves through Chicago, while the lake-rail grain can, and generally does,

by-pass that gateway to start its rail journey at lower lake ports. (Rep. 18, 28; R. 22, 32)

On that point the Commission in Appendix B to the report shows that in the period 1940 to 1943 (first ten months) 9,865,000 bushels of grain arrived at Chicago via lake. (Rep. 41; R. 48) The Commission also found that this grain was attracted to Chicago by the present proportionals; that the uniform proportional on ex-lake grain permits it to be handled by Chicago dealers without discount; and that it is reshipped to points in central territory where the grain is processed and reshipped under transit to eastern trunk-line and New England territories. That particular ex-lake grain does not, therefore, by-pass the Chicago gateway. It cannot do so because central territory processors are not in line of movement from Lake Erie and Hudson River ports to eastern trunk-line and New England destinations. The competition of ex-barge grain with ex-lake grain is in serving these central territory processors under transit on the basis of the uniform proportional rates to eastern trunk-line territory. The finding of the Commission as to ex-lake grain by-passing Chicago provides no rational support for the rate discrepancy prescribed by the Commission on that traffic.

Finally, the Commission finds that the ex-lake rates from Chicago do not adversely affect the barge-line appellees because, says the Commission, if the ex-lake rates were increased so as to be higher than ex-barge, the lake grain from the Northwest would flow to Lake Erie and Hudson River ports without corresponding benefit to the barge-line appellees. (Rep. 29; R. 33) That conclusion is contradicted by the earlier finding of fact as to the actual movement of ex-lake grain to central territory processors who cannot be served through Lake Erie and Hudson River

ports. This further attempt of the Commission to differentiate between ex-lake and ex-barge grain provides no rational basis for the rate discrepancies prescribed and approved by it.

II. The Commission failed to make findings sufficient to support the assailed discrimination between connecting carriers.

It is demonstrated in the foregoing section of this brief that the findings of the Commission are not relevant to the issue under Section 3(4). Further, it is shown that the prescribed difference in rates between connecting carriers has no rational basis in the circumstances which the Commission found in support of such rate relationship. In so doing, we have accepted the report of the Commission at face value and treated it as if the Commission had squarely faced the Section 3(4) issue, which it purported to do. Yet when the individual findings are analyzed as above, it becomes clear that the Commission erroneously conceived that the extraneous matters mentioned somehow modify the meaning of that prohibition. The attention given that section is more virtual than real.

Where as here there is question as to the interpretation which the Commission placed on a certain provision of the law, this court will look to the brief and argument of the Commission and accept the statements found therein as to the Commission's position. *United States v. Illinois Central R. Co.*, 291 U.S. 457, 461. This court has on occasions requested of the Commission a brief on its behalf discussing the meaning and application of its order. *Illinois Commerce Commission v. Thomson*, 318 U.S. 675, 681. In this case, the fact that the order of the Commission bears no reasonable relation to the various conditions and circumstances which it noted in its findings gives rise to the

searching question as to what the Commission really regarded as the guiding principle in its decision in this case. Put differently, the question is: what were the real views of the Commission and how was it guided in the fixing of the rate relationships prescribed in its order?

The real views of the Commission are made plain in its brief before this Court. Counsel for appellant makes no attempt to explain the rationale of the Commission's findings insofar as they purport to deal with the Section 3(4) issue. Throughout that brief the effort is to distract the Court's attention from the shortcomings of the report in this connection by urging (a) that the real problem and duty of the Commission in this case was to fix reasonable and nondiscriminatory through combination barge-rail rates; (b) that the fundamental guiding principle which the Commission had to follow in performing that duty was to make barge-rail rates properly related to the all-rail rates from the standpoint of the effect of those rates upon the movement of traffic over the all-rail and barge-rail routes; and (c) that the lower court exceeded its function and invaded the field of administrative discretion in its review of the Commission's order. By this argument counsel, in effect, pleads the Commission guilty of a failure to conform to the statutory standard as laid down by Section 3(4).

A. THE ORDER ATTEMPTS TO FIX REASONABLE THROUGH RATES WITHOUT REGARD TO SECTION 3(4).

At the further hearing the sole issue of concern to this appellee was whether, under all the facts, ex-barge proportionals relatively higher than ex-rail or ex-lake proportionals would violate Section 3(4). That section, as amended by the Transportation Act of 1940, provides that common carriers by railroad shall not discriminate in their rates and charges between connecting lines, and the term

"connecting lines" is defined as including "any" common carrier by railroad and "any" common carrier by water.

The appellant says that the reopened proceeding was to determine the "measure" of proportional rates on ex-barge grain. (Brf. p. 5) That measure was in issue, but not alone. To refer only to measure ignores the issue of lawful rate relations (ex-barge compared with ex-rail and ex-lake) under Section 3(4): A lawful rate relation is a matter separate and apart from a lawful rate measure. The lawful measure of rates is determined under Section 1 according to standards there provided. This appellee has no interest in the intrinsic measure of the ex-barge rates, and, therefore, raises no question as to the validity of the Commission's order under Section 1.

That the Commission thus failed to conform to the standard of Section 3(4) is apparent from a reading of the report. It is there made plain that the Commission considered the case as one calling only for the prescription of reasonable *through* combination ex-barge rates. Repeated references are made in the findings to differences between barge-rail, lake-rail, and all-rail circumstances. (Rep. 27-28; R. 31-33) Those terms relate to through movements from origins west of Chicago to destinations east thereof. This indicates that the Commission did not, in fact, dispose of the Section 3(4) issue as to the separately maintained proportional rates of the eastern railroads, but rather looked only to the combination through rates and their relation to each other.

Counsel for appellant spotlights this error. At pages 50-51 of appellant's brief it is succinctly stated (emphasis supplied):

> "Throughout its report the Commission was careful to stress the fact that it was treating of a through barge-rail transportation service, and that its *one concern* was to establish *reasonable* and non-discriminatory

charge for *that service*. Its task was the same as if it had been called upon to prescribe joint barge-rail rates under the provisions of Section 307(d).

Through its own counsel, the Commission pleads guilty of testing the discrimination by standards of reasonableness under Sections 1 and 307(d) of the Act, rather than by standards of fairly related and non-discriminatory rates under Section 3(4) of the Act.

In other portions of its brief, appellant emphasizes its view that the case before it involved only the reasonableness of through rates and that the case involved no separate issue as to lawful relation under Section 3(4) of the eastern proportionals accorded by the respondents to their western connections.

On page 34 of brief it states that the problem before the Commission was one of "administration, to determine what rates for the ex-barge traffic would be fair and equitable from the standpoint of the two types of carriers involved." The statute prohibits discrimination, and does not authorize the Commission to prescribe rate relations in the light of what would be "fair and equitable" if that means something different than non-discriminatory.

At pages 36 to 38 of brief, appellant describes certain of the western rail factors with emphasis on their reasonableness. Those factors have no bearing on the Section 3(4) issue.

At page 38 of brief, appellant says that appellees rely upon the existing ex-rail proportionals as a "true measure of reasonableness and lawfulness for the ex-barge traffic out of Chicago." That is not so as to reasonableness. The barge-line appellees had no standing before the Commission and have none in this Court to complain of rates as unreasonable, since they are not shippers. The only interest of the barge-line appellees in these rates is in the relation

of the ex-barge to the ex-rail and ex-lake rates. That interest is precisely the same, regardless of the measure of the rates and regardless of whether or not they are reasonable under Section 1 standards.

We raise no question as to the authority of the Commission to predicate its conclusion as to the reasonableness of rates under Section 1 on any characteristics which it here considered. That is not involved in the complaint of this appellee. To show that a given circumstance is relevant to the issue of reasonableness, does not show that it is relevant to the issue of discrimination. The field of inquiry under the latter issue is different. It extends only to circumstances which bear upon rate relations, and does not extend to circumstances which bear upon rate level, *per se*, considered apart from the lawfulness of the rate relations. This has been repeatedly recognized by this Court.

In *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U.S. 263, and at page 277 this Court said:

> We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by *Mr. Justice Blackburn* in *Great Western R. Co.* v. *Sutton*, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

See also *American Exp. Co.* v. *South Dakota ex rel. Caldwell*, 244 U.S. 617, 624, and *United States* v. *Illinois C. R. Co.*, 263 U.S. 515, 524.

At page 41 of brief, appellant says that the eastern ex-rail factors represent a lesser division of the through rate than would have resulted from a rate constructed on a mileage scale, and "therefore, afforded no proper basis for comparison." That may be true of a comparison offered on the issue of what is a maximum reasonable rate under Section 1. Whether or not it would be true in such a case will not be considered because that question is not presented. But when the comparison is offered on the question of discrimination under Section 3(4) it is not only proper but is the only comparison by which the alleged discrimination can be tested. And this is so whether or not the proportional rates given to the favored connections are above or below a reasonable level.

A proportional rate is an independently maintained, separable part of the through charges. As such, it must meet all standards of lawfulness standing alone.[15] This is particularly so with respect to the requirements of Section 3(4), because that section deals only with the treatment by a carrier of its connecting carriers. It therefore aims only at the proportional rate in which the carrier treats with its connections. The section has nothing to do with combination through rates.

The Commission conceded in its report that proportional rates are subject to the same criteria as other separately established rates (Rep. 26; R. 30), but held also that consideration must be given to the through rates resulting from the combination of those proportionals with the inbound rates. It is true that a proportional rate is related

[15] *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 105-09; *Atchison, T. & S. F. R. Co.* v. *U. S.* (1929), 279 U. S. 768, 776; *Great Northern R. Co.* v. *Sullivan* (1935), 294 U. S. 458, 462; *Cairo Board of Trade* v. *C. C. C. & St. L. Ry. Co.*, 46 I. C. C. 343, 350-51. See also "A Study of Proportional Rates" by Charles W. Berry (March, 1943) 10 I. C. C. Pract. Jour. 545.

to the inbound movement since such movement is the condition precedent to the application of that proportional. Further, there may be circumstances relating to the inbound hauls which are relevant under Section 3(4) to the lawfulness of the outbound proportionals. One such circumstance is the point or territory of origin, since it is recognized that proportional rates may vary according to differences in origin. However, that circumstance was ignored by the Commission in fixing the relation of ex-barge proportionals to ex-rail proportionals in this case. The Commission gave no heed to the similarity of origin points as between this appellee and competing connecting rail lines. Rather, it included in the ex-rail side of the comparison circumstances which related to the territories far removed from that served by barge lines. It thus subordinated the circumstances surrounding the transportation of ex-rail grain from barge-line territory.

The Commission did not properly discharge its function when it dealt only with the reasonableness of the aggregate barge-rail through rate and its relation to the aggregate all-rail combination through rate.

B. THE ORDER USES LOCAL RATES AS A STANDARD FOR LAWFUL EX-BARGE RATES WITHOUT REGARD TO SECTION 3(4).

Passing the errors relating to the Commission's consideration of through service on an average basis, in many prior cases cited by the Commission on page 26 of its report (R. 30) it held that Section 3(4) required an absolute equality of rates on traffic received from connecting lines. The Commission in the instant case suggests that such equality is not required if there are differences in circumstances and conditions surrounding the through transportation. (Rep. 26; R. 30) It concluded that when there are differences in average circumstances and con-

ditions surrounding the through services "ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences." (Rep. 22; R. 31-32) All this purports to approach the issue from the standpoint of what would constitute a proper relation between the separately established proportionals. The Commission's findings as to differences dealt with under Point I purport to justify a difference between such proportionals. In other words, the Commission in effect says that we will approve a difference between ex-barge proportionals on the one hand and ex-rail and ex-lake proportions on the other, which will give effect to the differences in conditions found by us.

The ultimate conclusion of the Commission is framed so as to provide that Section 3(4) is not violated as long as the ex-barge rates are no higher in relation to the ex-rail and ex-lake rates than results from the prescribed ex-barge rates when compared with the existing ex-rail and ex-lake rates. (Rep. 32; R. 36) However, it is apparent from the face of the report that the Commission did not in fact measure the approved difference by the differences found in transportation circumstances and conditions. This is made plain by the method used in arriving at the prescribed ex-barge rates—the deduction of specified amounts from corresponding local rates. In effect, the Commission declined to use the ex-rail and ex-lake proportionals, which are the rates and charges assessed on the traffic of connecting lines competing with appellees, as a standard to measure lawful ex-barge rates, allowance being made for differences in conditions.

Those competitive rates were put entirely out of view when the Commission reached the point of fixing lawful ex-barge rates. This fact is not disputed by appellant and it devotes pages 35 to 48 of brief to an attempted justification of this action.

The vice in the method followed by the Commission is that it wholly disregards Section 3(4). The local rates to which the Commission related the ex-barge rates are not the "rates and charges" on the traffic of any connecting line. The requirement of Section 3(4) is not satisfied by relating the charges on traffic from a particular connecting line to the local rate structure; it can only be satisfied by a proper relation between the rates and charges actually applied on traffic proceeding from connecting lines.

There is no rational support for an order which purports to comply with Section 3(4) by fixing ex-barge rates in terms of local rates.

C. THE ORDER TESTS THE RATES BY THEIR EFFECT ON THE MOVEMENT OF TRAFFIC WITHOUT REGARD TO SECTION 3(4).

At page 63 of brief, counsel for the appellant states (emphasis supplied):

> In determining a proper level of proportional rates the Commission set out *the guiding principle* which should govern its ultimate determination. This was *fundamentally the effect on the movement of the traffic* not only from the standpoint of the barge lines should the present ex-barge proportionals be increased, but on the rail lines should the existing ex-barge proportionals be perpetuated, all in the light of the national transportation policy as affecting the various competing relationships. (R. 33)

Here is further evidence that the Commission confused its function under Section 1 of the Act with its function under Section 3(4).

Section 15a(2) of the Act provides (emphasis supplied):

> In the exercise of its power to prescribe *just and reasonable rates* the Commission shall give due consideration, among other factors, to the effect of rates

> on the movement of traffic by the carrier or carriers for which the rates are prescribed; . . .

The proportional rates prescribed in this case apply entirely over the lines of eastern railroads. The Commission should, therefore, give consideration to the effect of those rates on the movement of traffic to the East when it determines what is a reasonable rate for the eastern carrier. However, when the Commission measured the rate relation between competitive connecting carriers by the effect of that relation on the movement of traffic, it acted beyond the limits of its statutory authority. The statute does not give the Commission the power to fix proportional rates so as to force traffic over the line of one connecting inbound carrier in preference to a competing connecting inbound carrier.

The effect of a particular rate relation on the movement of traffic is significant in a Section 3(4) case only to show whether or not the complaining party is damaged by the rate relation. On that point we need not go beyond the Commission's finding that the higher ex-barge proportional rates will cause ex-barge grain to be discounted on the Chicago market, and that a discounted price would make it less advantageous for the grain to move inbound via barge than via rail. (Rep. 16, 17, 23; R. 20, 27, 31)

As to that the Commission made a hypothetical statement in its report as follows (Rep. 29; R. 33-34):

> *If* the rates on the ex-barge traffic are adjusted "in view of its particular circumstances and under the provisions of the Act designed with reference thereto," the barge-rail traffic will have a fair opportunity to move in competition with the lake-rail and all-rail traffics, thus preserving the inherent advantage of barge transportation to the adjacent farm community and all others concerned, without any adverse effect on the wartime stabilization program or the effective use of the waterway.

The test of whether a given rate relation is discriminatory or not is not the fairness of the opportunity to participate in the through traffic. The true test is whether there are differences in relevant circumstances which justify the prescription of the given rate discrepancy. That test was not applied by the Commission. That is not to say that appellee claims a right to a particular rate or to retain or regain certain traffic. Appellant misstates the position of appellee on page 34 of brief, where it is said:

> The barge lines complain that the rates approved by the Commission will result in diversion of traffic from them to the rail lines. That there may be some diversion of traffic is not denied. But their contention assumes that they are entitled under the law to all the traffic they are now carrying and any loss of that traffic as a result of the Commission's order automatically invalidates it. In other words they claim that the present territory from which they now draw traffic—up to 77 miles from the river elevators—is inflexibly tributary to their mode of transportation.

Appellee claims no right to particular traffic as a matter of law. It does claim the right to whatever traffic will be attracted to its line when the proportionals for the movement east of Chicago are properly related to ex-rail and ex-lake proportionals. Whether the amount of traffic lost is great or small has nothing at all to do with the lawfulness of any rate relation under Section 3(4). That relation must depend upon statutory standards; and when statutory standards are observed in fixing the relation, it is of no consequence that traffic is either lost or gained by the lines involved.

Finally, appellant concludes (pp. 49-50) "that it is difficult to find a discrimination against the barge-rail service as a whole" because the combination barge-rail rates are less than the combination all-rail rates. The answer to that observation is that Section 3(4) does not

deal with a difference between barge-rail and all-rail rates. It prohibits discrimination in rates between connecting carriers. Such discrimination is unlawful, even though the barge-rail combination remains less than all-rail, unless it is warranted by transportation circumstances. The Commission failed to find such circumstance, but arbitrarily approved the discrimination.

III. The lower court did not transgress on the administrative domain, but held that the Commission committed an error of law in its interpretation of Section 3(4).

The complaint in this suit calls for judicial review of an order of the Commission which approved a rate relationship as lawful under Section 3(4) of the Act. In reviewing such an order, this Court should not substitute its judgment upon any question which Congress has committed to the Commission for determination. It should ascertain only whether the Commission acted within the powers conferred upon it by the statute, and correctly applied the rules of law. Appellees have raised no question as to the weight to be given the evidence or as to the conclusions to be drawn therefrom. We accept as final all of the findings of the Commission upon the facts and deal only with the sufficiency of the report on its face. Appellees do insist that the facts upon which the Commission based its conclusions are legally irrelevant under a proper construction of the statute and that the Commission's findings do not therefore support its order as a matter of law.

Appellant asserts that the lower court exceeded its function in entering a comprehensive series of findings of fact which clearly set forth the circumstances involved in the proceeding. However, appellant makes no specification of error in any finding of the lower court. They are brushed aside with the following statement (pp. 57-58):

Categorically to reply to all the detailed findings, criticisms, and argument employed by the court below to sustain its judgment would unduly prolong this brief. We submit that a careful study of the Commission's report demonstrates their fallacy.

Similarly, in its Assignments of Error Nos. 7 to 27 (R. 211-13), appellant asserts that the District Court erred in failing to give effect to certain findings of the Commission and in holding that certain findings were without pertinency. In its brief these assignments are listed collectively in paragraph 2 of the assigned errors to be urged. Yet in the argument portion of its brief, appellant does not in fact urge the errors assigned.

It is true that the lower court entered comprehensive and detailed findings of fact, upon which it entered its final decree. In so doing, we submit, the court did no more than it was required to do in examining the report of the Commission to determine whether the findings contained therein were sufficient to support the order. However, if we assume what we do not admit, that the court based its decree in part upon grounds which were beyond the proper scope of judicial review, that error would not be grounds for reversal of the decree, provided there are other and good grounds for setting aside the order. This court has held that on appeal it will confine its review to the grounds upon which the Commission itself based its action and will affirm the decision of the lower court even though the lower court relied upon a wrong ground or gave a wrong reason for its decision. *Securities and Exchange v. Chenery Corp.*, 318 U.S. 80, 88.

The lower court in essence decided that in passing upon the rates in question the Commission was bound to observe and apply the provisions of Section 3(4), and that it had failed to do so. (R. 205) The court properly condemned

the order because there had been a "departure from the statutory standard," *United States* v. *Missouri P. R. Co.*, 278 U.S. 269.

Counsel for the appellant states that the fundamental error of the court below was "in viewing the outbound movement as a single, independent, and unrelated shipment." (p. 50) That the lower court did not so view the case is plain from its findings and conclusion. The lower court did find that the Commission exceeded its authority because the differentiating circumstances found by it were either contradicted on the face of the report or were insufficient in law to support the rate discrepancies prescribed and approved. The court carefully reviewed all the circumstances considered by the Commission, but held that such circumstances were not legally relevant to the issue under Section 3(4). It concluded that an order based thereon is invalid.

This Court has many times set aside an order of the Commission for reasons that were identical in principle with those which persuaded the lower court in this case. Commission orders have been condemned wherever based upon findings of facts which were not relevant as a matter of law. *Southern P. Co.* v. *Interstate Commerce Com.*, 219 U.S. 433; *Ann Arbor R. Co.* v. *United States*, 281 U.S. 658, 666. The same principle applies conversely where, as here, the Commission fails to consider facts which are relevant as a matter of law. *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 168 U.S. 144; *American Trucking Asso.* v. *United States*, 326 U.S. 77. An order should be set aside when not supported by adequate findings and when the findings entered provide no rational basis for the ultimate conclusion. *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 454; *United States* v. *Carolina F. Carriers Corp.*, 315 U.S. 475; *Eastern-Central M. C. Asso.* v. *United States*,

321 U.S. 194. An order which shows an abuse of discretion should be set aside. *Mitchell* v. *United States*, 313 U.S. 80; *Southern P. Co.* v. *Interstate Commerce Com.*, 219 U.S. 433. Finally, the Commission here applied an erroneous construction of Section 3(4) of the statute and failed to extend to this appellee the protection required thereby. For that reason the lower court properly set aside the order. *United States* v. *Missouri P. R. Co.*, 278 U.S. 269.

IV. The order of the Commission is not supported by the prior decision in Interstate Commerce Commission v. Inland Waterways Corp.

The brief of appellant contains several references to the decision of this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, in which this Court refused to set aside a previous order of the Commission entered in this proceeding. In effect, appellant relies upon that decision as supporting the present order of the Commission which was entered after further hearing. There are several reasons why that decision does not support the order now before the Court. Nor does it support the manner in which the Commission applied Section 3(4) of the Act and the National Transportation Policy to the particular circumstances which it found on further hearing.

1. In the prior case in this Court, the assailed order of the Commission merely vacated its suspension of a railroad proposal to discontinue application of the ex-rail proportionals to ex-barge grain. Appellee contended that this was the equivalent of Commission approval and prescription of the full local rates for application on ex-barge grain. This Court held, however, that the Commission did not find that the local rate proposed by the respondents

would be lawful insofar as discrimination under Section 3(4) was concerned. (319 U.S. 671, 685)

Since that decision, the Commission has reheard the case upon the specific issue as to "what would be reasonable and otherwise lawful proportional or reshipping rates" for application to ex-barge traffic. (Rep. 9; R. 12) Throughout its report the Commission refers to the rates approved by its order as "prescribed rates." And the ultimate finding of the Commission in the present report is that the relation of the prescribed ex-barge rates to the present ex-rail and ex-lake proportionals will be nondiscriminatory and lawful under Section 3(4). (Rep. 32; R. 36) In other words, on this appeal the Court is confronted for the first time with an order of the Commission prescribing proportional rates for ex-barge grain and approving under Section 3(4) the relation between those rates and the rates applied on ex-lake and ex-rail grain.

2. In the initial proceedings both the Commission and the Court stated that it was the contention of this appellee that it was entitled, as a matter of law, to the continuation of the existing adjustment, and that Section 3(4) prohibited any difference in rates as between connecting carriers, regardless of differentiating circumstances which might be found. As the Court phrased it (319 U.S. 671, 691): Appellees "relied upon the erroneous view that they were by law entitled to the fortuitous and in many respects unlawful benefits of the existing rate structure." That cannot be said of the position of appellees in the case now before the Court.

The above quoted statement of the Court had to do with the following situation, which existed at the time of the decision but which does not exist now. In the prior proceedings before the Commission this appellee sought only the cancellation of the railroad proposal so as to

continue in effect the existing proportionals. Under the schedules in effect, the tariffs were and are so phrased as to provide the Northwest basis on ex-barge grain from Illinois when reshipped to central territory destinations. This was a truly fortuitous situation, and the Court correctly noted the difference in the factual circumstances surrounding ex-barge grain from Illinois, as compared with ex-rail grain from the Northwest, and held that those differences could control. The Court said at page 688:

> . . . To sustain the injunction would require a holding that grain originating 60 miles from Chicago must as a matter of law be given the benefit of proportionals fixed with reference to grain from the Northwest Territory, embracing points in Canada and as far west in the United States as Washington and the Dakotas. In addition to the disparity in distances, there is the further fact that the grain from the Northwest is predominately wheat, while that from the territory served by the barge lines is predominately corn from Illinois. Nothing in the Interstate Commerce Act as amended by the Transportation Act of 1940, or in the statements of even the most ardent Congressional champions of water transportation, affords the slightest warrant for a decision that the Commission must treat as legally identical such widely disparate factual situations.

With that statement there can be, and is, no disagreement.

In addition to the foregoing both the Court and the Commission labored under a misapprehension that the same fortuitous circumstance was true as to the ex-barge grain from Kansas City, in which this appellee is interested. (319 U.S. 671, 675) In the report now before the Court, the Commission correctly finds that ex-barge grain from Kansas City presently takes the identical proportional rate basis applicable on ex-rail grain from Kansas

City. It takes the Trans-Mississippi proportional and not the Northwest proportional. (Rep. 15, 20; R. 16, 24)

Counsel for the appellant would have the Court believe that appellees still seek a continuation of the Northwest proportional on Illinois ex-barge grain when reshipped to central territory; it is so stated at page 35 of appellant's brief. That is not true. The barge-line appellees on further hearing sought from the Commission a parity with proportionals applied to ex-rail grain *from the same origin.* They sought the ex-Illinois basis on Illinois grain and the Trans-Mississippi basis on Kansas City grain. (Rep. 24; R. 28)

In other words, the Commission was not asked to treat as legally identical such widely disparate factual situations as exist between Northwest grain and Illinois grain. It was asked to treat ex-barge grain from Illinois the same as ex-rail grain from Illinois in view of the identical situations as to all circumstances relevant to the lawfulness of the rate relations. (Rep. 24; R. 28) The contention of appellees now before this Court is not that they are entitled, as a matter of law, to the present proportionals. The contention is that the Commission failed to follow statutory standards in arriving at the rate relation (ex-barge compared with ex-lake and ex-rail) that is approved and prescribed by its report and order.

3. In its first report, the Commission relied heavily upon the fact that the existing barge-rail rate from Illinois provided through barge-rail rates less than the local rates from Chicago, and held that this was a violation of Section 4(1) of the Act. This Court emphasized that circumstance in its prior decision (319 U.S. 671, 677), and presumably referred thereto when it used the phrase "unlawful benefits." This proposition has been taken out of the case by the current order of the Commission. In

the report now before the Court the Commission finds that a combination through rate made up of an inbound barge factor and an outbound rail proportional is not unlawful under Section 4, even though it is lower than the local rate for the all-rail service from the reshipping point to the same destination. (Rep. 30; R. 34-35)

The only real similarity between the two cases is that the same carriers are involved and it is the same grain traffic. The rates involved are not the same, because in the report now before the Court the Commission for the first time prescribed rates for application on the ex-barge traffic and approved the relation between those rates and the ex-rail rates. In so doing, the Commission undertook to specify certain factual differences as supporting its order. The question presented on this appeal is whether the differences so found provide a rational basis for that order. No such question was before the Court in the prior case, and it follows that nothing held by this Court therein can be construed as approving the manner in which the Commission disposed of the case on further hearing.

CONCLUSION.

The court below set aside an order of the Commission which prescribed the proportional rates which the eastern railroads are to charge on traffic handled to the reshipping point by connecting barge lines. The court condemned that order because it approved ex-barge rates higher than the proportionals charged on traffic handled for connecting rail lines without any findings as to transportation circumstances and conditions, such as would warrant that relationship under statutory standards.

In this brief we have shown that the decision of the lower court was correct. Most of the circumstances found

by the Commission are not points of difference between ex-barge and ex-rail traffic, but are points of similarity, and the Commission did not find to the contrary. As to the differences the Commission did find between ex-barge and ex-grain traffic, none of those differences is legally relevant under the provisions of Section 3(4) of the Act.

When the many details of the case are boiled down to the essential facts, it therefore stands out that the Commission has exceeded its authority. It has failed to conform to the statutory standards. It has authorized the Pennsylvania Railroad to charge more on grain brought from Kansas City to Chicago by the Federal Barge Lines than on grain brought from Kansas City to Chicago by the Alton Railroad, even though it performs precisely the same service in either case, and even though each of the two connecting carriers brings the grain from the same origin and interchanges with the Pennsylvania Railroad under the same circumstances and conditions. We respectfully submit that the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A.

National Transportation Policy

(Title 49 U.S.C.)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Transportation Act of 1940

(Title 49, U.S.C., sec. 4, note)

Sec. 6(b) In the case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Commerce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of

this Act shall be required to be changed by reason of the amendments made to such paragraph by subsection (a) of this section. In the case of a carrier not heretofore subject to the provisions of such paragraph, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed, by reason of the provisions of such paragraph, as amended by subsection (a) of this section, prior to six months after the enactment of this Act, or in case application for the continuance of any such existing rate, fare, or charge is filed with the Interstate Commerce Commission within such six months period, until the Commission has acted upon such application.

INTERSTATE COMMERCE ACT

(Title 49, U.S.C.)

Sec. 3(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Sec. 4(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included

within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

Sec. 15a(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.